EMPLOYEE AND INDEPENDENT CONTRACTOR - WHERE ARE WE NOW?

Geoffrey A. Garland, CA and Paul K. Grower

Introduction

The issue of whether a worker is an employee or an independent contractor is one that is frequently raised in every tax professional's practice. A number of excellent articles have been published which review the development of the common law in this area. The goal of this paper is to add to these articles through a review of recent jurisprudence in the area of worker classification. In addition, the authors hope to provide the reader with some practical assistance in determining a worker's classification as well as the effects of such a determination.

Recent Case-Law

The Supreme Court of Canada

671122 Ontario Ltd. v. Sagaz Industries Canada Inc.

Of the cases released in the last several years, the most important is the Supreme Court of Canada's decision in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. 3

671122 had lost a supply contract with Canadian Tire to its competitor Sagaz. 671122 subsequently learned that a consultant, hired by Sagaz to obtain the Canadian Tire account, had done so by bribing the head of Canadian Tire's automotive division. 671122 commenced a claim against Sagaz on the basis that it was vicariously liable for the actions of its consultant. In order for vicariously liability to be found, the consultant would have to be an employee of Sagaz. The Supreme Court found that Sagaz was not liable as the consultant was not an employee of Sagaz, but rather, an independent contractor.

In its analysis, the court turned its attention to the Federal Court of Appeal decision in Wiebe Door Services Ltd. v. Minister of National Revenue. 4 In Wiebe Door, the appeal court noted that historically, the factor that determined whether an employee-employer relationship existed, was the degree of control the payor had over the actions of the worker. The appeal court quoted from the Supreme Court decision in Hôpital Notre-Dame de l'Espérance c. Laurent, 5 at page 613:

[T]he essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work.

However, the appeal court recognized that the control test had inherent problems:

A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.
The appeal court then reviewed the four-in-one solution that had been proposed by Lord Wright in *Montreal (City) v. Montreal Locomotive Works Ltd.*, at page 169:

In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, ... In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.

The appeal court also noted the integration test that had been outlined by Lord Denning in *Stephenson, Jordan & Harrison Ltd. v. MacDonald & Evans*, at page 111:

One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

The Supreme Court concurred with the comments of the appeal court with respect to this integration/organization test:

Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. ...

The Supreme Court then specifically emphasized the last sentence of the above quote:

*We must keep in mind that it was with respect to the business of the employee that Lord Wright addressed the question "Whose business is it?"*

The court outlined the test proposed by R. Flannigan, which provides that the employer should be vicariously liable because: (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it.

After a review of these respective tests, the court summarized its findings as follows, at paragraph 46:

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. ... Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, supra, at p. 38, that what must always occur is a search for the total relationship of the parties: [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which
factors should, in any given case, be treated as the determining ones.

The court's conclusion was succinct, reminding us that all of these factors that have been developed by the previous jurisprudence were for the purpose of determining one central question:

... whether the person who has been engaged to perform the services is performing them as a person in business on his own account.

Therefore, while the court did not lay out a particular test or set of factors (in fact, it accepted all of the above noted tests and factors) to be used in determining a worker's classification, it reminded us that "we must not pay so much attention to the trees that we lose sight of the forest [...] The parts must give way to the whole." 10

This "reminder" from the court has been noted by the Federal Court of Appeal in a number of recent decisions.

The Federal Court of Appeal

*Wolf v. R.*

In *Wolf v. R.*, 11 the taxpayer, who was an engineer, was hired by a Canadian firm (the "payor"). The payor had obtained the services of the taxpayer through the use of a consulting firm. The relevant facts were as follows: 12

1. The contract was between the taxpayer and the consulting firm who had, in turn, contracted with the payor.

2. The payor could terminate the agreement if the taxpayer did not provide his services in a workmanlike and professional manner.

3. The taxpayer was paid hourly, which included overtime pay (which, according to the taxpayer, was to encourage consultants to finish their work in the shortest amount of time possible).

4. The taxpayer also received paid statutory holidays (the taxpayer explained that he could not work on those days as the payor's offices were closed), vacation pay and had an opportunity to receive a completion bonus (which employees were not eligible for). However, the taxpayer did not receive all of the same benefits as employees of the payor.

5. The taxpayer was not instructed in the manner as to how to do the work.

6. The payor supplied the taxpayer with a computer, but no specific office for the taxpayer to work in.

The Tax Court found that the taxpayer was an employee due to the following factors: (1) The taxpayer was controlled with respect to what projects he worked on; (2) There was no evidence that the taxpayer could delegate his services; (3) The taxpayer provided continuing services to the payor, as opposed to working on one specific result or project; (4) The taxpayer was expected to be at the payor's premises during normal hours of work; (5) The taxpayer received overtime, vacation and holiday pay; (6) The payor provided the tools; and (7) The consulting firm issued the taxpayer a T4.

At the Federal Court of Appeal, Justice Desjardins reviewed the *Sagaz* decision and commented,
at paragraph 62:

I therefore plan to examine the level of control [the payor] exercised over the [taxpayer's] activities, the ownership of the equipment necessary to perform the work, whether the [taxpayer] hired his own helpers, and the degree of financial risk and of profit, as they relate to circumstances such as these, where an individual with specialized skills is hired by an employment agency to perform work for a third party. I will then assess whether these factors were properly applied by the Tax Court judge in light of all the circumstances of this case.

Justice Desjardins reviewed a number of factors in finding that the taxpayer was an independent contractor:

Firstly, the contract was for a limited period (one year) with the opportunity for renewal only if there was sufficient work.

The second factor was control. Justice Desjardins noted that control is difficult to examine when dealing with a professional due to their high skill level. In this case, since the payor did not control the manner of the work performed by the taxpayer this factor was neutral. She found that the fact that the taxpayer could not delegate work and had to report to the payor's premises during business hours were not enough to support a finding of an employment relationship.

While the payor provided the taxpayer with a computer, this was a neutral factor since the taxpayer had to work on the payor's computers to do the work.

Fourthly, the taxpayer faced the chance of profit and risk of loss as he chose to work for higher pay in exchange for giving up health insurance, a pension plan and other benefits. In addition, the taxpayer had the opportunity to receive a completion bonus if he finished his tasks early.

Finally, from the taxpayer's perspective, he was not integrated into the business of the payor as he was only hired to provide his specific services for a specific need. Once that need was met - the taxpayer was out of a job.

Justice Décary concurred in the result, but focused to a much greater extent on the provisions of the Quebec Civil Code in his findings. He concluded that the primary factor that needed to be examined was that of control, and in this case, the taxpayer was not subordinate to the payor. Furthermore, the parties had agreed to a relationship where the taxpayer had sacrificed security and benefits for greater remuneration. As the Justice states at paragraph 119:

Taxpayers may arrange their affairs in such a lawful way as they wish. ... When a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search.

Justice Noël agreed with his colleagues' finding that the control and ownership of tools tests were neutral. He also found that the financial risk test was neutral. The taxpayer faced financial risk in that he had accepted higher pay in exchange for lesser benefits and a lack of job security. However, the taxpayer was paid for days he did not work (statutory holidays). Because of this neutrality, Justice Noël relied on the contractual intent of the parties to find that an independent contractor relationship existed.

Hogg, Magee and Li, in their Text *Principles of Canadian Income Tax Law*, have criticized this decision.
With respect, this decision is wrong. The Court looked at only three factors not the "non-exhaustive" list that Sagaz stated should be considered. Two of the justices found two of three factors to be inconclusive and one justice found all three factors to be inconclusive and so relied on the contract between the parties. The Court never looked at any other factors such as the number of persons to whom the taxpayer provided his or her services during a given period of time. This factor (i.e., the integration test) asks the question "whose business is it?" by looking at the economic dependence of the worker. If the services are provided to one company for a significant amount of time (e.g., about five years in Wolf), then it is a strong indication that the taxpayer is an employee and not an independent contractor. ...

In addition, readers should be cognizant of the fact, in particular given Justice Décary's comments, that this case relied on the provisions of the Quebec Civil Code, and therefore, its applicability in Canadian common-law jurisdictions may be somewhat limited.

**Precision Gutters Ltd. v. Minister of National Revenue**

Precision Gutters Ltd. v. Minister of National Revenue, 16 dealt with individuals hired to install eaves-troughs (Installers).

Precision would negotiate contracts with customers and then hire Installers to perform the actual work. The court noted the following additional facts:

1. There was no guaranteed amount of work for the Installers;
2. The Installers could, and did, work for others;
3. Installers could refuse work;
4. Installers could hire helpers and paid the helpers out of the remuneration received from Precision;
5. Installers had to issue an invoice in order to be paid;
6. Contracts were paid "by the foot" and Installers did negotiate the payment on 20-30% of all contracts.
7. All Installers had their own hand tools. Some used Precision's eavestrough forming machines, while others supplied their own.
8. There were no deadlines and work was not supervised nor inspected by Precision.
9. If there were any deficiencies in the Installer's work, it had to be rectified at the Installer's expense.

The Federal Court of Appeal set out to determine whether the Installers had been engaged to perform the services as a person in business on their own account by examining the four factors set out in Wiebe Door.

With respect to Control, the court agreed with the lower court that this indicated an independent contractor relationship.

The Tax Court judge had found that since the tools owned by the Installers were not specific to the eaves-trough business, they did not support a finding of an independent contractor. The
appeal court dismissed this reasoning. What matters is that the worker expended funds to obtain these tools. Furthermore, the tools supplied by the Installers were just as important as the forming machines provided by Precision. The court noted that:

It has been held that if the worker owns the tools of the trade which it is reasonable for him to own, this test will point to the conclusion that the individual is an independent contractor even though the alleged employer provides special tools for the particular business.

The appeal court easily found a chance of profit and a risk of loss on the part of the Installers. The Installers decided which jobs to work on (though there was no guarantee as to the amount of work from Precision), could negotiate the price with Precision, could work for others and could hire helpers. Furthermore, more efficient work on the part of the Installer allowed Installers to complete more jobs. Finally, the Installers were responsible for remedying all defects in their work.

The court also clarified how the Integration test is applied. The question to be asked is not "Whose business is it?", but rather "Is the person who has engaged himself to perform the services performing them as a person in business for his own account". The former question implies that there can be only one business - which would normally result in a finding of an employer-employee relationship. To put it another way, this is why the Integration Test is approached from the vantage point of the worker and not the payor.

_Meredith v. R._

The decision in _Meredith v. R._ 17 dealt with an individual's right to an overseas employment tax credit. CRA refused the credit on the basis that the taxpayer was not an employee, but rather, an independent contractor.

The appeal court's analysis contained a number of issues beyond the scope of this paper, but it made an important comment with respect to the test of control, at paragraph 15:

The recent decision of this Court in _Groupe Desmarais Pinsonneault & Avard Inc. c. Ministre du Revenu national_ 18 is instructive on the issue of control. There, Noël J.A. writing for the Court indicated that the question is not whether the [payor] did or did not exercise control, but whether it was in a position to do so. The importance lies in the [payor]'s legal power to control the employees, not whether the employees feel subject to that control. ...

This restatement of the control test helps deal with the situation of highly skilled workers. For example, it would be ludicrous for an employer to instruct a highly skilled employee (such as an IT employee) on how they are to do their job. However, the employer, if they ever wished to do so, would have that authority. 19

**Yellow Cab Co. v. Minister of National Revenue**

In _Yellow Cab Co. v. Minister of National Revenue_ 20 the corporate taxpayer owned the rights in a fleet of taxis for insurance and other purposes, while individuals owned the right to operate each respective taxi. Some of the individuals operated their taxis (owner-operators), while others leased their right to a separate individual (lease-operators). These operators could also hire drivers, subject to the taxpayer's approval, to drive the taxis.
CRA had assessed the taxpayer for EI and CPP premiums for one owner-operator and eight lease-operators. Each of the operators hired their own drivers to drive the taxis (each also drove themselves) and issued T4 slips showing the operator as the employer.

The owner-operator was responsible for all maintenance and operating costs for his taxi. However, the taxpayer had the option of purchasing back the rights in the taxi or otherwise financially penalizing the owner-operator if they did not perform adequately.

The lease-operators paid a monthly fee and were also responsible for all maintenance costs for the taxi (which included using the taxpayer's fuel and bookkeeping services). They were obligated to follow all dispatched instructions and to continuously operate their taxi.

The Employment Insurance Act deems all taxi drivers to be employees unless they meet certain criteria. The relevant criteria for this case was whether the operators were the owner or operator of a business. 21

The majority 22 of the Federal Court of Appeal found that the lease-operators (and for similar reasons, the owner-operator) were independent contractors for the following reasons:

1. While they were under a significant degree of control by the taxpayer, this was not sufficient, on its own, for a finding of an employment relationship.

2. Their lease provided the operators with an exclusive right to a particular taxi, 23 therefore they were providing their own tools. Furthermore, Yellow Cab did not own the taxi - the owner who did not operate their cab, but rather, leased it to the lease-operator, did.

3. They had fixed (lease) and variable (fuel, maintenance) costs, while their gross income fluctuated with their skill and effort. Therefore, they certainly faced the chance of profit and risk of loss.

4. They could, and did, hire their own helpers. 24

The majority found that the lease-operators were operating their own business of operating a taxi, while the taxpayer operated a separate business of providing taxi support services (dispatching, bookkeeping, etc.).

The majority then compared this decision with those of other "taxicab" decisions. Such an analysis provides a valuable insight as to what factors the court considers most material.

In Canada (Attorney General) v. Skyline Cabs (1982) Ltd., 25 the Federal Court of Appeal found that the lease operators were employees. The court in Yellow Cab noted that those drivers were controlled with respect to dress, grooming, conduct, cleanliness of cars, and the collection of credit card revenues. More importantly, Skyline Cabs owned the taxicabs in question. 26 Finally, it appeared that the lease-operators could not hire helpers.

Poulin c. Ministre du Revenu national

The decision of Poulin c. Ministre du Revenu national 27 is a decision where one can certainly argue that justice and equity prevailed.

Mr. Poulin suffered a terrible accident which rendered him a quadriplegic. His condition meant
that he needed extensive care to meet his personal daily needs. He received public assistance to pay for this care, however, he was responsible for hiring and managing the individuals who provided that care.

CRA assessed Mr. Poulin as the employer of two personal attendants and an individual who provided homemaking services. The Tax Court affirmed this finding.

The appeal court began its examination with a review of the test of control. It noted that the test has lost some of its usefulness due to the increased specialization of the workforce. Many payors do not have the skills to control the manner of work of these highly specialized workers. Furthermore, a large degree of control can exist in an independent contractor relationship. Many independent contractors are controlled with respect to where the work is performed, when the work is performed and the materials and specifications of the job. 28 In addition, many independent contractors are subject to productivity and quality controls. 29

In the case at bar, the court noted that Mr. Poulin had little control over the nursing duties that were performed by his attendants, as he, himself, did not have the skill to do so. With respect to the homemaking service, the court noted that Mr. Poulin's specific instructions as to what household tasks are to be performed did not make the relationship one of an employer-employee. The court also noted that payment on an hourly basis does not create an employer-employee relationship. As the court states:

It is not uncommon for contractors, for example in plumbing, heating or electricity, to work and invoice according to established hourly rates, and, as in the case of employees, increased rates on holidays.

The court also examined the fact that the individuals hired could not delegate the work. The court found it perfectly reasonable for Mr. Poulin to demand that this highly personal work be carried out by an individual that he knew and had confidence in.

With respect to ownership of tools, the court stressed that a difference must be noted between work materials and work instruments, at paragraph 24:

... What homeowner has not purchased materials in order, for example, to renovate a bathroom, build or rebuild a patio, and subsequently hired the services of a contractor, through a contract for services, to have the latter do the erection and installation of the materials acquired thereby using his own work tools? The fact that the applicant owns the drugs he swallows, the urinary condoms he wears, the catheters he uses, the waterproof covers on his bed to protect against leaks, etc. and that he supplies these materials to the workers who install them does not make him an employer. These are not work instruments, but materials necessitated by the work. The installation of these materials and the administration of the drugs, like most of the services rendered to the applicant, for all practical purposes do not require any work instruments.

The court also noted that while Mr. Poulin provided his own vehicle, it was perfectly reasonable since it had been adapted for his specific needs. 30

The court made an interesting point with respect to chances of profit and risks of loss:

had the services been rendered by an agency under a contract for services, the risks of losses and the chances of profits would have been no different than they were for the
three workers in question. 31

The court did note that vacation pay was paid to the workers, but following the reasoning in Wolf, dismissed this as a factor on the basis that the workers were unable to take vacations due to the needs of Mr. Poulin.

The court concluded that the relevant tests did not differentiate the relationship from one of employment to one of an independent contractor. Because of this, the court turned to the agreement and the circumstances between the parties to find the true worker classification.

The court found that Mr. Poulin never intended to become an employer. Furthermore, the workers never claimed to be employees and never requested that their work be declared insurable/pensionable. Therefore, the relationship was found to be that of an independent contractor.

There is a saying amongst the legal profession that "Hard Cases Make Bad Law". It is arguable that the appeal court was swayed by the equities of this case (as a finding of employment would have resulted in significant financial hardship for Mr. Poulin). However, the comments made by the court do provide valuable ammunition for future disagreements with CRA.

The Tax Court of Canada

There have been several cases of note in the last few years from the Tax Court. They include: Sara Consulting & Promotions Inc. v. Minister of National Revenue, 32 TSS-Technical Service Solutions Inc. v. Minister of National Revenue, 33 and Shaw Communications Inc. v. Minister of National Revenue. 34 All of these cases have been thoroughly reviewed by previous articles prepared for the Canadian Tax Foundation. 35

Leave to appeal the Federal Court of Appeal's affirmation of Shaw was recently dismissed by the Supreme Court of Canada. 36 It is important, therefore, to briefly review a few of the key points raised by the Tax Court in this decision.

Briefly, the case involved workers of Shaw who sold and installed cable television and cable internet. The standard-form contract indicated that the workers were independent contractors and had to supply their own vehicle and tools (Shaw provided the materials). The workers were paid on a piece-rate basis, but had to make any repairs of deficient work at their own cost.

Justice Mogan of the Tax Court found that the workers were employees for a number of reasons, which are readily understandable:

1. Shaw provided medical and insurance benefits to the workers.
2. The agreement between the parties was a non-negotiable, standard-form contract. This did not indicate an equality of bargaining power that one would expect in an independent contractor relationship.
3. The workers were controlled with respect to when they performed their tasks by Shaw.
4. Shaw provided the sales materials used by the workers.

Justice Mogan also made some findings to support his finding of an employment relationship which the authors find surprising:
1. **The customers clearly belonged to Shaw and not to the workers.** This is interesting in that many independent contractors provide services to customers that have a contractual relationship with the payor. For example, when a lawyer retains an accountant to prepare a damages analysis, the "customer" still belongs to the lawyer, but there is no question that the accountant is an independent contractor.

2. **The fact that the workers were paid a 100% commission did not mean that they had complete freedom as to when they worked. They had to work hard to earn a living.** This reasoning is difficult to understand since a 100% commission allows a worker to decide how high a standard of living they want to achieve. Clearly this would be indicative of an independent contractor.

3. **The court noted that "the opportunity to make a profit from the sound management of a business is different from the opportunity to earn more revenue by efficient piece-work or by longer hours at a flat rate."** The court is correct that this is no different than an employee who decides to work additional hours. However, an independent contractor also has to incur expenses, many of which are fixed and must be paid regardless of whether the worker works or not. In the Shaw decision, the workers were responsible for such on-going expenses as liability insurance and vehicle maintenance. The court found that the amounts paid to the workers would have taken these costs into account, but if the worker did not work — they still had those costs to bear.

4. **The court noted that an individual would have to be "truly incompetent" to suffer a loss.** With respect, the court's reasoning is improper. It is the author's opinion that the test is not whether a person would have to be incompetent to suffer a loss, but rather, whether it was possible to suffer a loss given the fact that the worker had to pay expenses, unlike an employee. 

Given the affirmation by the Federal Court of Appeal, it could be argued that the above-noted reasoning has been accepted by the appellant court. However, the appeal court simply stated that they had not been convinced that Justice Mogan had committed any:

reviewable error in finding that the individuals in question ... were employees and not independent contractors. ... There was evidence on the record to support the findings made.

Therefore, the Federal Court of Appeal's affirmation could be read as stating that there were sufficient reasons or facts to support Justice Mogan's ultimate decision, without necessarily agreeing with all of his reasoning. However, the fact that the appeal court made no disparaging comments with respect to Justice Mogan's reasoning may indicate that similar reasoning may be explicitly accepted by that court in the future.

The Supreme Court of Canada's refusal to grant leave to appeal, without reasons, is even more difficult to "read into". It is likely that given its recent decision in Sagaz the court saw no need to, once again, pontificate on the issue of worker determination. In addition, given the specific facts of the case, the court may not have viewed it to be a case of national importance such that the Supreme Court of Canada should rule on it.

### Some Practical Assistance in Determining a Worker's Classification

Every tax practitioner has been approached, either by a client or a colleague, with a request to determine a worker's classification. The difficulty that can often arise is in determining which
questions should be asked about the worker and their relationship with the payor. While almost everyone is familiar with the tests articulated by *Wiebe Door Services Ltd. v. MNR*, and hopefully, each reader is, by now, aware of the clarification of these tests by the Supreme Court in *Sagaz*, it is of little use to ask the client how “integrated” the worker is within the business of the payor. Clients and colleagues require specific questions, which can be easily answered, to provide the tax practitioner with the information they need to make their determination. With this in mind, the authors have compiled a list of specific factors which have been recognized by the courts, the Canada Revenue Agency and the Internal Revenue Service in making the determination of a worker's classification.

The factors which follow immediately are those that the authors have found in a review of Tax Court decisions in 2003 and 2004. The factors are labeled as either employee (E) or independent contractor (IC). With respect to "Factors Recognized by the Courts" recent cases are footnoted to provide the reader with authorities.

**Factors Recognized By The Courts**

**The Contract Itself**

- Intention of the parties (IC v. E)
  - Did the parties act consistently with the title given to the relationship?
  - Did the worker fully understand what an independent contractor was?
  - Some cases only examine this factor if the other *Wiebe Door* factors do not give a clear answer as to the nature of the relationship
- Terms
  - Intellectual property created by worker belongs to payor (E)
  - Set tasks in contract (IC) or tasks to be set by payor (E)
  - Set length of term of the contract (IC)
  - Use of the terms employment, employ, employee, employer, etc. (E)
  - Worker serves the payor (*contract of service*) (E)
- Written contract is always helpful

**Control**

- Bind the Payor
  - Enter into contracts without payor approval (IC)
- Deadlines
  - If none set by payor (IC), but can be IC even if set by payor
  - Helpers/Replacement can be hired by worker (IC), if not (E)
  - Even if worker cannot hire helper or replacement worker, if worker has expertise (doctor v. plumber), still IC
• Worker chooses helper/replacement that is hired (IC) 58

• Manner of Work (E) 59

  • Not strictly enforced or guidelines only (IC) 60

    • Payor determines working hours, what to be done and how to do it (E) 61, but can be IC even if payor determining what work to be done and where and when 62

    • Standard operating procedures enforced (E) 63, but guidelines as to behavior can still be IC 64

  • Payor could not control even if they desired to do so (IC) 65

    • Because of lack of knowledge by the payor (IC) 66

    • Because of the nature of the work (IC) 66

  • Result is all that is controlled by the payor, the manner of how the work is performed is at the discretion of the worker (IC) 67

• Set hours (E) 68

• Supervision

  • High (E), Low (IC) 69

• Payor dispatches worker (E) 70

  • Worker can still say "No" to work assignment (IC) 71

• Payor sets amounts charged to customers/clients (E) 72

• Reporting to Payor

  • Regular basis (E) 73

  • Irregular basis (IC) 74

• Uniforms (E), but some cases say a non-factor 75

• Worker can decline work (IC) 76

Economic

• Advances on payments can be IC 78

• Advertising paid by payor (E) 79

• Benefits provided by payor (E) 80

• Clients/Customers belong to the worker (IC) 81

• Correcting deficiencies in work "for free" (IC) 82, if paid to fix (E) 83

• Entrepreneurial element to work of the worker (IC) 84

• Expenses paid by worker (IC) 85, if none (E) 86

• Expenses paid by payor (E) 87
• Helpers paid by worker (IC) 88
• Rent charged by payor (IC) 89
• "Washed Out" by corresponding increase in remuneration, therefore removing risk (E) 90
• G.S.T. charged by worker (IC) 91
• Invoices issued by worker (IC) 92, if not (E) 93
• Liability insurance paid by worker (IC) 94
• No job security (IC) 95
• No guaranty of amount of work (IC) 96
• Paid even if no work to be done (E) 97

Payment
• Commission
  • If base salary also (E), if pure commission (IC) 98
  • If income of worker does not fluctuate with that of payor (E) 99, if does (IC) 100
• Negotiated between worker and payor (IC) 101
• Piece work (IC), especially if worker not paid if they do not produce 102
• Regular pay period (E) 103
• Set pay, no matter how hard worker works (E) 104, but hourly work can still be IC 105
• Worker does not want a fixed salary - wants the risk (IC) 106

Profit / Loss
• Financial risk (expenses that worker has to cover, particularly ongoing expenses) (IC) 107
• Work harder, more income (IC), especially if fixed expenses exist that could result in a loss if worker does not work 108
  • Does not matter if limited by law as to how much can work in a set period 109
• Work harder, more income (neutral) because same for employees and IC 110
• Worker investing in business (capital, beyond a minimal extent, is invested) (IC) 111
• Worker actually lost money (IC) 112
• Statutory deductions made by payor (E) 113
• Vacation pay paid by payor (E) 114
• Work space provided by payor (E) 115
• Worker has a business bank account (IC) 116
• Worker has own business name (IC) 119

**Integration**

• Business dependent on worker for its whole operation
  
  • If no (IC) 120, if yes (E)
  
  • Workers that are recognized as employees also do similar work so business of payor can continue without worker (IC) 121

• Business records maintained and stored by whom - payor (E), 122 worker (IC)

• Clients/Customers are the "property" of the payor (E) 123

• Examined from the perspective of the worker 124
  
  • The worker can and does contract its services to other payors (IC) 125

• Intent of worker (E or IC) 126

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• Monitoring of work done by payor

• Payor has right to control manner in which work is done
• Payor has right to control time and place work is done

• Payor set hours of work

• Set hours of work

• Uniform provided

• Vacations must be scheduled by worker with payor

• Work is inspected

• Worker cannot refuse work

• Worker has to follow set procedure, rules of conduct, etc.

• Worker has to justify why not at work (doctor's note)

• Worker has to record hours

• Worker has to report to payor on a regular basis

• Worker has to report to payor's premises on a regular basis

Economic

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Factors Recognized by the United States Internal Revenue Service

Workers in the United States also have to grapple with the effects of their worker classification when dealing with the Internal Revenue Service ("IRS"). While this article is focused on the employee/independent contractor determination of Canadian workers, the authors suggest that an examination of IRS procedures can provide valuable insight into this determination by providing additional factors that can be examined to assist such a determination.

The United States Internal Revenue Service ("IRS") looks at three main factors in determining whether a worker is an employee or an independent contractor. They are:

1. Behavioral Control;
2. Financial Control; and
3. Relationship of the Parties.

**Behavioral Control** is comparable to the "Control Test" in Canadian jurisprudence. The focus is on the payor's right to direct and control the manner in which the work is done by the worker. The more extensive the instructions which are given to the worker, the more likely an employment relationship exists. Instructions may include:

1. When, where and how to do the work.
2. What tools or equipment to use.
3. What workers to hire or to assist with the work.
4. Where to purchase supplies and services.
5. What work must be performed by a specified individual.
6. What order or sequence to follow.

In addition, if the payor provides training, an employment relationship is more likely to be found.

**Financial Control** examines the business itself. The following factors are identified by the IRS as being indicative of an independent contractor relationship:

1. Has the worker made a significant investment in the business?
2. Has the worker incurred un-reimbursed business expenses, and in particular, to what extent does the worker have fixed costs?
3. Has the worker made him or herself available to the market through such activities as maintaining a business location or advertising?
4. Is the worker not guaranteed any income by the payor?
5. Is there the opportunity for the worker to incur a profit or a loss?

Finally, the *Relationship of the Parties* examines how the worker and the payor view the relationship. Factors which indicate an independent contractor relationship include:

1. A written contract which identifies the relationship as being an independent contractor.
2. The worker does not receive employee-esque benefits (medical benefits, sick days, etc.)
3. The relationship between the payor and the worker does not have a permanence to it.
4. The worker's work is not an integral part of the business of the payor.

The IRS allows parties to submit a request for a determination of a worker's employment/independent contractor status. The questions posed by the IRS in such a determination give a better indication of what practical factors are used by the IRS in determining a worker's status.

With respect to *Behavioral Control*, the following questions are posed:

1. What specific training and/or instruction is the worker given by the firm?
2. How does the worker receive work assignments?
3. Who determines the methods by which the assignments are performed?
4. Who is the worker required to contact if problems or complaints arise and who is responsible for their resolution?
5. What types of reports are required from the worker?
6. Describe the worker's daily routine (i.e., schedule, hours, etc.).
7. At what location(s) does the worker perform services (e.g., firm's premises, own shop or office, home, customer's location, etc.)?
8. Describe any meetings the worker is required to attend and any penalties for not attending (e.g., sales meetings, monthly meetings, staff meetings, etc.).
9. Is the worker required to provide the services personally?
10. If substitutes or helpers are needed, who hires them?
11. If the worker hires the substitutes or helpers, is approval required? If "Yes," by whom?
12. Who pays the substitutes or helpers?
13. Is the worker reimbursed if the worker pays the substitutes or helpers? If "Yes," by whom?

With respect to *Financial Control*, the questions are as follows:

1. List the supplies, equipment, materials, and property provided by each party.
2. Does the worker lease equipment? If "Yes," what are the terms of the lease?
3. What expenses are incurred by the worker in the performance of services for the firm?
4. Type of pay the worker receives: Salary, Commission, Hourly Wage, Piece Work, and Lump Sum.

5. If type of pay is commission, and the firm guarantees a minimum amount of pay, specify amount.

6. Is the worker allowed a drawing account for advances?

7. Whom does the customer pay - the Firm or the Worker? If worker, does the worker pay the total amount to the firm?

8. Does the firm carry worker's compensation insurance on the worker?

9. What economic loss or financial risk, if any, can the worker incur beyond the normal loss of salary (e.g., loss or damage of equipment, material, etc.)?

The following questions examine the Relationship of the Parties:

1. List the benefits available to the worker (e.g., paid vacations, sick pay, pensions, and bonuses).

2. Can the relationship be terminated by either party without incurring liability or penalty?

3. Does the worker perform similar services for others?

4. Is the worker a member of a union?

5. What type of advertising, if any, does the worker do (e.g., a business listing in a directory, business cards, etc.)?

6. If the worker assembles or processes a product at home, who provides the materials and instructions or pattern?

7. What does the worker do with the finished product (e.g., return it to the firm, provide it to another party, or sell it)?

8. How does the firm represent the worker to its customers (e.g., employee, partner, representative, or contractor)?

9. Describe any agreements prohibiting competition between the worker and the firm while the worker is performing services or during any later period.

The IRS also requests additional information with respect to service providers or salespeople:

1. What are the worker's responsibilities in soliciting new customers?

2. Who provides the worker with leads to prospective customers?

3. Describe any reporting requirements pertaining to the leads.

4. What terms and conditions of sale, if any, are required by the firm?

5. Are orders submitted to and subject to approval by the firm?

6. Who determines the worker's territory?
7. Did the worker pay for the privilege of serving customers on the route or in the territory?

8. Where does the worker sell the product (e.g., in a home, retail establishment, etc.)?

The Practical Effects of a Worker's Determination

Advantages of Independent Contractor Relationship

There are a number of definite tax and non-tax advantages to becoming a self-employed individual.

- The biggest advantage is the ability to deduct expenses from your income that you otherwise would not have been able to deduct as an employee such as, but not limited to:
  - Accounting and legal fees;
  - Annual fees and business taxes;
  - Capital expenditures;
  - Convention expenses;
  - Insurance premiums;
  - Office rent/home office expenses;
  - Private health services plans premiums;
  - Professional membership dues;
  - Rental costs of equipment;
  - Salary paid to assistants;
  - Supplies; and
  - Traveling expenses.

- Opportunity to deduct losses incurred in business activities against other forms of income.

- If your taxable revenues are less that $30,000 annually, you are considered a small supplier and you are not required to register for GST/HST purposes.

- Ability to set ones own hours and work schedule.

- You don't have to pay Employment Insurance (EI) premiums.

Disadvantages of Independent Contractor Relationship

While the ability to deduct expenses is a major factor in the decision to become an independent contractor, rather than an employee, there are a number of factors other than this which should be considered:

- No EI protection. As a self-employed worker you are not required to pay EI premiums and thus will not be able to collect EI.

- No vacation pay.

- There are increased Canada Pension Plan (CPP) costs as the independent contractor is required to make both employer and employee contributions.

- Loss of security in that as you are no longer employed, you do not have the security that
comes with an employer-employee relationship.

- Loss of tax-free benefits that often comes along with an employer-employee relationship such as dental, medical plans and long term disability.

- Loss of any company pension which often comes as part of an employer-employer relationship.

- Loss of social aspects of a job as many people who become self-employed find that they miss the daily social interaction with other employees.

- Difficulty in obtaining credit due to the unpredictability of work and a variable stream of income.

- GST/HST implications and the determination of whether you have to register to collect GST on sales.

- Recordkeeping will have to be done for GST/HST, Retail Sales Tax, CPP and income tax purposes which is not as necessary and detailed as that required by an employee.

- Requirement to register with Canada Revenue Agency and responsibility to withhold and remit income taxes, EI and CPP from employees whom you employ.

- Provincial and local requirements for licenses and business applications.

### Employer Implications of Independent Contractor Relationship

From the employer perspective there are a number of implications for the classification of a worker as an independent contractor rather than an employee. These implications come in both tax and non-tax forms.

When there is an employer-employee relationship then the employer is required to:

- Register with Canada Revenue Agency to have an employer withholding tax account number.

- Withhold income tax, CPP contributions and EI premiums on amounts paid to employees.

- Remit the amounts withheld including the employers portion, on either a monthly or bi-monthly basis depending on the gross payroll paid by the employer.

- On an annual basis report the employees income and deductions on the appropriate information returns.

- Give the employees copies of their T4 slips by the end of February of the following calendar year.

- Remit other taxes such as Workers Compensation Board premiums and payroll taxes.

From a non-tax perspective the employer-employee relationship can create an obligation of the employer to:
• Provide health care plans and benefits;
• Provide pension plan benefits;
• Provide vacation pay and/or paid leave vacations;
• Provide Training; and
• Expense reimbursement for employment related expenditures.

For 2004 the rates for both EI and CPP are:

<table>
<thead>
<tr>
<th>Employer</th>
<th>Employee</th>
<th>Employer</th>
<th>Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>per $100 of earnings</td>
<td>per $100 of earnings</td>
<td>max</td>
<td>max</td>
</tr>
<tr>
<td>EI 266</td>
<td>1.98</td>
<td>2.77</td>
<td>$772.20</td>
</tr>
<tr>
<td>CPP 267</td>
<td>4.95</td>
<td>4.95</td>
<td>$1,831.50</td>
</tr>
</tbody>
</table>

When there is a business relationship or independent contractor relationship then the employer is required to:

• Where the income of the worker exceeds $500 the payor must report the income and tax deductions, if any, on the appropriate information returns,
• Give the worker copies of their T4A slips by the end of February of the following calendar year

Worker Implications of Independent Contractor Relationship

When there is an employer-employee relationship then the worker has no requirements with respect to withholding taxes, as the payor is required to withhold and remit income tax, EI and CPP on the earning of the employee.

When there is a business relationship or independent contractor relationship then the worker:

• Is required to pay both shares of CPP 268 to a maximum of $3,663.00.
• May also have to pay their income tax and CPP contributions in instalments on a quarterly basis.
• Should also be made aware, that they do not qualify for Employment Insurance benefits after the end of this relationship.

Numerical Example of Tax Effect of Reassessment

For the following example we propose to show the effect financially on both the worker and the payor in the event that Canada Revenue Agency was to reassess the relationship from that of an Independent Contractor relationship to that of an employer-employee relationship.

Assumptions:

• Rates are for the 2003 taxation year
• Contract for service amount: $50,000
• CPP rate of 4.95% for employee
• CPP rate of 9.9% for self-employed contractor
• Maximum CPP contribution of $1,801.80
• EI rate of $2.10 per $100 of insurable earning for employee
• EI rate of $2.94 per $100 of insurable earning for employer
• Maximum EI contribution of $819 for employee
• Maximum EI contribution of $1,147 for employer

Effect if taxed as Independent contractor

Employer
• The employer is required to report by the end of February of the following year the amount of earnings on form T5018 Statement of Contract Payments.
• No requirement to withhold income taxes, CPP, EI and pay employer portion of EI and CPP.

Worker
• The worker would be required to report the earning on their personal tax return and pay taxes by April 30 of the following year.
• Worker is not subject to EI.
• Worker would be required to pay CPP equaling the lesser of:
  • $1,801.80 X 2 = $3,603.60
  • $50,000 X 9.9% = $4,950.00

Combined remittances for Employer and Worker excluding Income Tax

<table>
<thead>
<tr>
<th></th>
<th>Employer</th>
<th>Worker</th>
</tr>
</thead>
<tbody>
<tr>
<td>EI</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>CPP</td>
<td>0.00</td>
<td>$3,603.60</td>
</tr>
</tbody>
</table>

Effect if Canada Revenue Agency Reassessed as Employer-Employee Relationship

Employer
• The employer would be responsible for withholding and remitting income tax.
• The employer would be responsible for withholding EI premiums of $819 from the worker.
• The employer would be responsible for remitting their portion of EI premiums of $1,147.
• The employer would be responsible for withholding CPP premiums of $1,801.80 from the worker.
• The employer would be responsible for remitting their portion of CPP premiums of $1,801.80.
Worker

- The worker would have income tax payments withheld from their gross pay.
- The worker would have EI premiums of $819 withheld from their gross pay.
- The worker would have CPP premiums of $1801.80 withheld from their gross pay.

**Combined remittances for Employer and Worker excluding Income Tax**

<table>
<thead>
<tr>
<th></th>
<th>Employer</th>
<th>Worker</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>EI</td>
<td>$1,147.00</td>
<td>819.00</td>
<td>$1,966.00</td>
</tr>
<tr>
<td>CPP</td>
<td>$1,801.80</td>
<td>1,801.80</td>
<td>$3,603.80</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Increase premiums (combined) by payor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>Pre-reassessment</td>
</tr>
<tr>
<td>Post-reassessment</td>
</tr>
<tr>
<td>Increase(decrease)</td>
</tr>
</tbody>
</table>

**However, the payor would be able to deduct both the EI and CPP employer contributions. At a tax rate of 40.12%, the after-tax amount would be $1,765.74.**

Results of reassessment

From this simplified example the result of a reassessment from the CPP and EI perspective has the greatest ramifications for the employer who suddenly has the obligation of paying their portion of the premiums which can be quite significant.

For the worker, the CPP and EI reassessment results in a net refund. However, there are other areas which could result in very negative results for the worker. The most negative result of being classified an employee rather than an independent contractor is the denial of many expenses which may have been claimed by the worker. This will result in additional taxes being owed by the worker which may well be in excess of the refund of CPP premiums paid.

The employer may also be liable for other areas as a result of a reassessment and the classification of a worker as an employee rather than an independent contractor. Some of the areas which may be affected and should be recognized by the employer include:

- Requirement to retroactively and to continue to pay benefits which other employees of the business are eligible for;
- Requirement to pay vacation pay benefits on the income earned as the worker is now considered an employee;
- Possible requirement for employer to remit payroll taxes (if provincially applicable) if total salary of the employer after reassessment exceeds threshold; and
- Reclassification of amounts paid to worker as salary could result in a Workers Compensation Board premium requirement.
The employer, as a result of the reassessment will also be subject to both late filing penalties on the late remittances as well as interest on the balances due. As of June 30, 2003, the penalty for late filed remittances is 10% for any remittances which are late greater than 8 days. The employer should be aware, as well, that a reassessment could result in their average monthly remittances increasing to a point where their remittance due dates could change. For employers with monthly remittances of between $15,000 and $50,000 remittances are due on the 25th of the month for pay periods before the 16th and on the 10th of the following month for pay periods after the 15th and before the end of the month. For an employer who has an average monthly remittance of greater than $50,000 they are required to remit by the third working day after the end of the following periods: 1st through the 7th, the 8th through to the 14th, the 15th through to the 21st and the 22nd through to the end of the month.

Effect of Penalties and Interest

To expand on our previous example of the magnitude of the effect of the penalties and interest to the employer, let us assume that the reassessment of the above taxpayer who was reassessed was one of 10 persons who were under contract of the payor. It is now 3 years after the work period and the CRA has reassessed all 10 workers. For simplicity we will use the 2003 rates above and assume that only this one year is under question.

To begin, the employer would have been required to withhold and remit to the CRA both their portion and the employees portion of CPP and EI which totaled $5,569.80. Extrapolated for the 10 employees the remittances due, which are now 3 years late, total $55,698.00. CRA will assess a 10% late filing penalty of $5,569.80 as well as interest on the late remittance and the penalty.

The interest component of the reassessment is calculated not from the date of reassessment but rather from the date the remittances should have been made. Likewise, the interest which will be assessed on the penalty is also assessed and owed from that same point, not the date of the reassessment. The prescribed interest rates, which are set quarterly, for the period under reassessment we are using ranged from 10% in the fourth quarter in 2000 to 7% for the current 2nd quarter of 2004. Therefore, if we use a date of April 30, 2004 as our payment date the interest owing from the reassessment calculated as owing since December 31, 2000 would be $16,406.00. There will also be interest on the penalty from December 31, 2000 which totals $1,641.00. The resulting interest will total $18,047.00.

The grand total that will be owing by the employer will be $79,314.80.

Compound this reassessment over a number of years being reassessed and the result can be potential financial hardship on a business. It may therefore be in the best interest of your client who is in this position to take a proactive approach to determine how CRA would assess their relationship with a worker before an audit. A payor or a worker can file a CPT1 form, Request for a Ruling as to the Status of a Worker Under the Canada Pension Plan and/or the Employment Insurance Act. This form allows the payor or the worker to determine how CRA would assess their current relationship and allow the relationship to be amended if the result given by CRA is not what was intended.

In the situation where it was thought that there was originally an employer-employee relationship which is in fact that of an Independent Contractor relationship, the employer can file form PD24 for a refund of EI premiums remitted in error back 3 years.

An employer is also allowed to "collect back" from their employee, the past 12 months worth of employee EI premiums and CPP contributions if a relationship that was believed to be that of an
independent contractor is found to be an employment relationship. 275

Corporations — A Possible Solution?

By definition, a corporation cannot be an employee. 276 Therefore, a possible solution to avoid the finding of an employer-employee relationship is to have each worker incorporate. The payor would then engage the corporation, which would, in turn, employ the worker. 277

While this solution appears elegant in its simplicity, a number of issues do arise.

The first flows from the Income Tax Act itself. The definition of active business income in subsection 125(7) excludes Personal Services Business Income. Vern Krishna, in his text The Fundamentals of Canadian Income Tax 278 defines a "personal services business" as follows:

A personal services business is a business in which a major shareholder of a corporation provides services through the corporation in circumstances where the shareholder would normally provide the services as an employee. Thus, in effect, the shareholder is an "incorporated employee".

Therefore, if a corporation is operating a personal services business, its income is taxed at the highest corporate income tax rate and is not eligible for the small business deduction.

In addition to the high tax rate, a corporation that operates a personal services business is generally restricted in its ability to claim expenses against its income other than the salary or benefits paid to its employee. 279

The negative tax effects that a personal services business suffers will not cause a problem if the worker would normally flow the income out of the corporation annually. The net effect would be, for all intents and purposes, the same as if the worker earned the income directly from the payor. However, any worker that is encouraged to incorporate needs to be cautioned about these restrictions.

In all likeliness, the most important factor that will influence a worker's decision to incorporate will be cost. For example, an incorporated worker has to:

1. File annual returns for the corporation.
2. Prepare a tax return for the corporation, in addition to the worker's personal tax return.
3. Withhold and remit CPP, EI and income tax source deductions from the remuneration paid to the worker.

The payor also has to monitor the corporate filings of the worker. If the corporation fails to file annual returns with the companies office, it will be dissolved and the corporation will legally cease to exist. 280 The protection offered to the payor as a result of the corporation would then be lost.

Therefore, given the costs and limited benefits provided to the worker, it is not surprising that without financial support from the payor, few workers incorporate. 1

The authors would like to thank Ken Grower of BDO Dunwoody LLP and Cy Fien of Fillmore Riley LLP, for their comments and assistance in the writing of this paper. Any errors are, of course, solely the responsibility of...

87 DTC 5025; [1986] 2 CTC 200 (FCA). Hogg, Magee and Li, in their text, Principles of Canadian Income Tax Law, online: Taxnetpro, at Chapter 5.2 - "Office and employment defined", outline the tests recognized in Wiebe Door:


The Supreme Court also recognized the following additional factors: whether the worker provides his or her own equipment; whether the worker hires his or her own helpers; the degree of financial risk taken by the worker; the degree of responsibility for investment and management held by the worker; and the worker's opportunity for profit in the performance of his or her tasks.


The payor actually paid the consulting firm, who in turn paid the taxpayer.

Readers should note that this is a rather generous interpretation of the chance of profit / risk of loss test.

While at first reading, this can be seen as the appeal court giving deference to the contractual intent of the parties, it must be noted that the court still requires the parties to act consistently with the title given to the relationship by the contract.

Hogg, Magee and Li, Principles of Canadian Income Tax Law, online: Taxnetpro, at Chapter 5.2 - "Office and employment defined".
Note should be taken of the Federal Court of Appeal's comments in *Poulin*, below, which places a qualifier on this statement.


Sexton J.A., Issac J.A. concurring. Malone J.A. also agreed with the majority that the lease-operators were independent contractors as per the reasoning in *Sagaz*. However, he found that the provisions of the *Employment Insurance Regulations* used a broader definition of employee, and therefore, the lease-operators were employees for those purposes.

As opposed to a different taxi, from a fleet of taxis, being assigned to the operator every day.

Interestingly, the majority took no note of the fact that the taxpayer had final approval for all drivers hired by the lease operators.


The majority noted that a similar fact situation existed in the decision *Checkmate Cabs Ltd. v. Minister of National Revenue*, [1998] T.C.J. No. 329, where the court found the drivers to be independent contractors.

2003 FCA 50. Please note that this decision came out of Quebec.

The best example of this is in the construction industry when the general contractor has to control a number of sub-trades to ensure the job is completed in an orderly manner.

In fact, the Federal Court of Appeal in *Canada (Attorney General) v. Charbonneau*, [1996] F.C.J. No. 1337, held that monitoring the result must not be confused with controlling the worker. It is perfectly reasonable for a payor to monitor the result of an independent contractor.

This further supports the argument that payors who provide job-specific tools are not necessarily employers.

Paragraph 26.

2001 CarswellNat 2595 (TCC).

2002 CarswellNat 486 (TCC).

2003 DTC 1459 (TCC); aff'd 2003 FCA 171.

Leave to appeal to Supreme Court dismissed with costs, September 25, 2003, 2003 CarswellNat 2880.

2003 FCA 171.

[2001] 2 SCR. 983.

87 DTC 5025; [1986] 2 CTC 200 (FCA).

It should be noted, however, that according to a QuickLaw search conducted on May 2, 2004, 1,537 decisions have cited *Wiebe Door*, and as the vast majority of those are tax decisions, there should now be a decided case for almost every scenario that a tax professional comes upon.

The reader may notice that the cases are cited in a manner that they may not be familiar with. In January, 2003, the Tax Court of Canada adopted the Neutral Citation for Case Law adopted by the Canadian Association of Law Librarians and the Canadian Judicial Council. For more information, see the Canadian Citation Committee website,


*Dodds v. Minister of National Revenue*, 2004 TCC 29.

*Capri Interiors Ltd. v. Minister of National Revenue*, 2004 TCC 23.


Dave Livingstone Trucking Ltd. v. Minister of National Revenue, 2004 TCC 196.

Access Communications Cooperative Ltd. v. R., 2003 TCC 873.


Taiga Air Services Ltd. v. Minister of National Revenue, 2003 TCC 757.


West Direct Express Ltd. v. Minister of National Revenue, 2003 CarswellNat 354 (TCC); Dave Livingstone Trucking Ltd. v. Minister of National Revenue, 2004 TCC 196.


Dodds v. Minister of National Revenue, 2004 TCC 29.


821743 Ontario Inc. v. Minister of National Revenue, 2003 TCC 168.

Capri Interiors Ltd. v. Minister of National Revenue, 2004 TCC 23; Access Communications Cooperative Ltd. v. R., 2003 TCC 873; Taiga Air Services Ltd. v. Minister of National Revenue, 2003 TCC 757; Precision Gutters Ltd. v. Minister of National Revenue, 2002 FCA 207.

Crackerjacks Inc. v. Minister of National Revenue, 2003 CarswellNat 3455 (TCC).


Capri Interiors Ltd. v. Minister of National Revenue, 2004 TCC 23.


Dodds v. Minister of National Revenue, 2004 TCC 29.


West Direct Express Ltd. v. Minister of National Revenue, 2003 CarswellNat 354 (TCC).

Topolovich v. Minister of National Revenue, 2003 TCC 651.

Capri Interiors Ltd. v. Minister of National Revenue, 2004 TCC 23.

Capri Interiors Ltd. v. Minister of National Revenue, 2004 TCC 23; Carabas v. Minister of National Revenue, 2004 TCC 175.


Taiga Air Services Ltd. v. Minister of National Revenue, 2003 TCC 757.


Taiga Air Services Ltd. v. Minister of National Revenue, 2003 TCC 757; Access Communications Cooperative Ltd. v. R., 2003 TCC 873; Capri Interiors Ltd. v. Minister of National Revenue, 2004 TCC 23.

821743 Ontario Inc. v. Minister of National Revenue, 2003 TCC 168.


Dave Livingstone Trucking Ltd. v. Minister of National Revenue, 2004 TCC 196.

McLean v. The Queen, 2004 TCC 200.


Crackerjacks Inc. v. Minister of National Revenue, 2003 CarswellNat 3455 (TCC).


P & D Investments Ltd. v. Minister of National Revenue, 2003 TCC 697.


Crackerjacks Inc. v. Minister of National Revenue, 2003 CarswellNat 3455 (TCC); Wolf v. R., 2002 DTC 6853 (F.CA).


Topolovich v. Minister of National Revenue, 2003 TCC 651; Yellow Cab Co. v. Minister of National Revenue,
2002 FCA 294.

111

*Taiga Air Services Ltd. v. Minister of National Revenue*, 2003 TCC 757.

112


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114

*Doering v. Minister of National Revenue*, 2003 TCC 100.

115


116

*Dodds v. Minister of National Revenue*, 2004 TCC 29.

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*Dodds v. Minister of National Revenue*, 2004 TCC 29.

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119

*Capri Interiors Ltd. v. Minister of National Revenue*, 2004 TCC 23.

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121

*Access Communications Cooperative Ltd. v. R.*, 2003 TCC 873.

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123


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125

*Doering v. Minister of National Revenue*, 2003 TCC 100.

126

*Capri Interiors Ltd. v. Minister of National Revenue*, 2004 TCC 23.

127


128

*Taiga Air Services Ltd. v. Minister of National Revenue*, 2003 TCC 757.

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*Taiga Air Services Ltd. v. Minister of National Revenue*, 2003 TCC 757.

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134
Dodds v. Minister of National Revenue, 2004 TCC 29.

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137
Sanclemente v. R., 2003 TCC 450; Precision Gutters Ltd. v. Minister of National Revenue, 2002 FCA 207.

138
Dodds v. Minister of National Revenue, 2004 TCC 29.

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141
Doering v. Minister of National Revenue, 2003 TCC 100.

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144
P & D Investments Ltd. v. Minister of National Revenue, 2003 TCC 697.

145
ABCO Property Management Inc. v. Minister of National Revenue, 2003 TCC 50; Yellow Cab Co. v. Minister of National Revenue, 2002 FCA 294.

146
P & D Investments Ltd. v. Minister of National Revenue, 2003 TCC 697; Yellow Cab Co. v. Minister of National Revenue, 2002 FCA 294.

147
ABCO Property Management Inc. v. Minister of National Revenue, 2003 TCC 50.

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151

Capri Interiors Ltd. v. Minister of National Revenue, 2004 TCC 23.

152

821743 Ontario Inc. v. Minister of National Revenue, 2003 TCC 168.

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Carabas v. Minister of National Revenue, 2004 TCC 175.

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Dodds v. Minister of National Revenue, 2004 TCC 29; Carabas v. Minister of National Revenue, 2004 TCC 175.

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Garland & Grower.

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Garland & Grower.

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P & D Investments Ltd. v. Minister of National Revenue, 2003 TCC 697; Capri Interiors Ltd. v. Minister of National Revenue, 2004 TCC 23.

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Garland & Grower.

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Garland & Grower.

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ABCO Property Management Inc. v. Minister of National Revenue, 2003 TCC 50.

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Garland & Grower.

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170
Waldbauer v. Minister of National Revenue, 2004 TCC 25; West Direct Express Ltd. v. Minister of National Revenue, 2003 CarswellNat 354 (TCC); Garland & Grower.

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Garland & Grower.

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CRA Publication RC4110 - Employee or Self-employed?

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CRA Publication RC4110 - Employee or Self-employed?

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Garland & Grower.

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178
Access Communications Cooperative Ltd. v. R., 2003 TCC 873.

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P & D Investments Ltd. v. Minister of National Revenue, 2003 TCC 697.

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West Direct Express Ltd. v. Minister of National Revenue, 2003 CarswellNat 354 (TCC).

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Access Communications Cooperative Ltd. v. R., 2003 TCC 873.

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Topolovich v. Minister of National Revenue, 2003 TCC 651.

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*P & D Investments Ltd. v. Minister of National Revenue*, 2003 TCC 697; Garland & Grower.

Garland & Grower.


Access Communications Cooperative Ltd. v. R., 2003 TCC 873; *ABCO Property Management Inc. v. Minister of National Revenue*, 2003 TCC 50; Garland & Grower.

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Access Communications Cooperative Ltd. v. R., 2003 TCC 873.


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P & D Investments Ltd. v. Minister of National Revenue, 2003 TCC 697.
237
Access Communications Cooperative Ltd. v. R., 2003 TCC 873.
238
Garland & Grower.
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Garland & Grower.
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It is important to note that while Canadian courts will examine US case-law to assist them in determining issues, they are reluctant to do so if Canadian case-law already exists. Given the number of independent contractor/employee cases which presently exist in the Canadian jurisprudence it would be a rare instance where a similar fact situation has not already been dealt with by a Canadian court.
242
Internal Revenue Service Website, "Frequently Asked Tax Questions And Answers",
243
244
Internal Revenue Service Website, Form SS-8,
245
In 1987, the IRS published its list of 20 factors, that it had compiled from court decisions, which had been used to determine a workers classification. Ruling 87-41, can be found at:
246
This is due to the general deductibility of business expenses which is allowed under subsection 9(1) and paragraph 18(1)(a) of the Income Tax Act, RSC 1985, c. 1, (5th Supp.), as amended (hereinafter "Income Tax Act").
247
Which are limited to those allowed by section 8 of the Income Tax Act.
248
249
Subsection 3(d), Income Tax Act.
250
Section 148 and paragraph 240(1)(a) of the Excise Tax Act, RSC 1985, c. E-15, as amended (hereinafter "Excise
Tax Act}).


Section 7, Employment Insurance Act.

Section 10, Canada Pension Plan, RSC 1985, c. C-8, as amended (hereinafter "Canada Pension Plan").

Section 286, Excise Tax Act.

For example, see subsection 17(2) of the Manitoba Retail Sales Tax Act, CCSM, c. R130.

Section 24, Canada Pension Plan


Section 67 and subsection 82(1), Employment Insurance Act.

Subsections 8(1) and 21(1), Canada Pension Plan.

Subsections 8(1) and 21(1), Canada Pension Plan.

Section 67 and subsection 82(1), Employment Insurance Act.

Note should be made of the fact that WCB premiums sometimes have to be paid for both independent contractors and employees depending on the industry involved.

Which may not exist in all jurisdictions.

Canada Revenue Agency Website, "EI Rates",

Canada Revenue Agency Website, "CPP Rates",

Section 10, Canada Pension Plan.

Canada Revenue Agency Website, "EI Rates",

However, this would be deductible against the payor's income tax.

However, this would be deductible against the payor's income tax.
Which is the current highest Manitoba corporate tax rate.

Subsection 82(9), Employment Insurance Act, subsection 21(7), Canada Pension Plan.

Canada Revenue Agency Website, "Prescribed Interest Rates",

Subsection 82(6), Employment Insurance Act, subsection 21(4) of the Canada Pension Plan.

Subsection 248(1) of the Income Tax Act defines employment as "the position of an individual in the service of some other person ...", and defines individual as "a person other than a corporation".

A worker who is employed by a corporation of which he is a 40% (or greater) shareholder is not subject to the requirement to submit EI premiums (paragraph 5(2)(a), Employment Insurance Act).

Vern Krishna, The Fundamentals of Canadian Income Tax, online: Taxnetpro, at Chapter 20 - "Corporate Business Income".


In Manitoba, the Director of Companies Branch can dissolve a corporation after it has failed to file two consecutive annual returns (The Corporations Act, C.C.S.M. c. C225, section 205).

Author Information:

Bibliography Information: